UNITED NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 546

Cases No. 588: CHRISTY
No. 589: THORSTENSEN
No. 590: WHITE

Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, Vice-President; Mr. Arnold Kean;

Whereas, on 28 February 1991, Lawrence Christy, a staff member of the Food and Agricultural Organization of the United Nations, hereinafter referred to as FAO, Svein Thorstensen, a staff member of the International Atomic Energy Agency, hereinafter referred to as IAEA, and Michael Robert White, a staff member of the International Maritime Organization, hereinafter referred to as IMO, filed applications containing the following pleas:

> "MAY IT PLEASE the presiding member to agree to the holding of oral proceedings in this case.
>
> AND MAY IT PLEASE the Tribunal:
>
> 1. To declare itself competent in this case;
>
> 2. To declare and judge the application receivable;
>
> 3. To order the rescission of the decision taken by the Standing Committee [of the Joint Staff Pension Board] acting on behalf of the Board, at its 171st meeting, held on 27 June 1990 in London, to confirm the decision of the Secretary of the Board to

apply to the Applicant, as from 1 February 1990, the pensionable remuneration scales for staff in the Professional and higher categories, obtained in accordance with the new rules (reducing the first adjustment due after 1 January 1990 by 2.8 percentage points and excluding the multiplicative factor of 1.22) contained in article 54(b) of the Regulations of the Fund, as amended by resolution 44/199 of the General Assembly of the United Nations on 21 December 1989, and not in accordance with the previous rules (including the multiplicative factor of 1.22, without reducing the due adjustments) contained in the said article 54(b) in force from 1 April 1987 to 31 December 1989, and to draw all the legal consequences of this rescission;

4. To award the Applicant, as costs, a sum payable by the Respondent, assessed at the time of submission of this application at forty thousand (40,000) French francs, subject to adjustment upon completion of the proceedings."

Whereas the Respondent filed his answer on 2 August 1991;

Whereas the Applicants filed written observations on 22 August 1991;

Whereas the Tribunal heard the parties at a public hearing on 25 October 1991;

Whereas additional information was submitted by the Respondent on 25 October 1991 and by the Applicants on 29 October 1991;

Whereas the facts in the three cases are as follows:

Lawrence Christy has been a participant in the Joint Staff Pension Fund as an FAO staff member since 19 January 1976; at the time of the contested decision, he was Chief of the Development Law Service, at the D-1, step III level. Svein Thorstensen has been a participant in the Fund as an IAEA staff member since 4 May 1969; at the time of the contested decision, he was Director, Division of Operations C, Department of Safeguards, at the D-1, step VIII level. Michael Robert White has been a participant in the Fund as an IMO staff member since 4 February 1973; at the time of the contested decision, he was Head of the English Translation Section, at the P-5, step IX level.

At its forty-first session, the General Assembly had approved a revised scale of pensionable remuneration for the Professional and higher categories effective 1 April 1987. At the same time, it had established a procedure for the adjustment of the scale between comprehensive reviews. As described by the International Civil Service Commission the adjustment procedure approved by the General Assembly provided for the scale of pensionable remuneration to be revised by reference to and on the same date as increases in net remuneration for United Nations officials in the Professional and higher categories in New York. Noting that remuneration was adjusted on a net basis while, since pensions were taxable in most countries, pensionable remuneration was determined on a gross basis, the Assembly decided that adjustments to pensionable remuneration would also need to be made on a gross basis. By comparison of the movement in United Nations net and gross remuneration, it was determined that a 5 per cent movement in the scale of pensionable remuneration corresponded to a 4.1 per cent adjustment in New York net remuneration (a 1.22 ratio). It was therefore decided that adjustments in pensionable remuneration would be based on the weighted average percentage movement in New York net remuneration multiplied by the above 1.22 factor.

The issue of pensionable remuneration for the Professional and higher categories, and more particularly the adjustment procedure, was considered by the International Civil Service Commission at its thirtieth session. In its report for the year 1989, volume I (A/44/30), the Commission noted the following developments subsequent to the implementation of the procedure:

> "30. The Commission noted that, since the implementation of the revised United Nations scale of pensionable remuneration on 1 April 1987, New York net remuneration had increased three times as a result of changes in post adjustment. This had resulted in a cumulative increase of 12.7 per cent, which, through the application of the 1.22 multiplicative factor, had produced a 15.5 per cent cumulative increase in pensionable remuneration. Over the same period, there had been two increases in pensionable remuneration (gross salary) in the United States federal civil

service, for a cumulative increase of 6.2 per cent. United Nations pensionable remuneration had thus been adjusted by a cumulative 9.3 percentage points beyond the adjustment applied to the comparator's scale.

31. The Commission noted that the above circumstances had led to a widening in the ratio of United Nations to United States pensionable remuneration from 119.7 when the April 1987 scale was adopted to 130.1 in May 1989. This widening in the United Nations/United States ratio of pensionable remuneration was due primarily to two factors: (a) the increase in the Washington/New York cost-of-living differential from 4.5 per cent in 1986 to 12.1 per cent in May 1989; and (b) the 1.22 multiplicative factor applied to the weighted average movement in United Nations net remuneration amounts in New York under the adjustment procedure for pensionable remuneration.

32. The Commission also noted that federal income tax brackets in the United States were now adjusted once a year for inflation. Consequently, salary increases corresponding to cost-of-living increases were no longer taxed at a higher rate. As a result the percentage increase in net salary was virtually the same as the percentage increase in gross salary. The above development suggested that the use of the 1.22 multiplicative factor to derive the percentage increase in United Nations pensionable remuneration from the percentage increase in New York net remuneration was no longer justified.

33. In reviewing this issue, the Commission further observed that income replacement ratios for United Nations staff had remained very close to their level when the General Assembly approved the revised scale of pensionable remuneration."

In the light of the foregoing, the Commission considered whether a modification should be made in the adjustment procedure, pending completion of the review of pensionable remuneration scheduled for 1990. After examining four alternative courses of action, the Commission decided to recommend to the General Assembly that any adjustment in pensionable remuneration due before completion of the 1990 review be made without application of the 1.22 multiplicative factor and that, in addition, the first such adjustment be reduced by 2.8 percentage points in order to remove the past impact of the 1.22 factor. By its

resolution 44/199 of 21 December 1989, section II, the General Assembly approved, pending the completion of the comprehensive review, the modification of the procedure for adjusting pensionable remuneration as recommended by the Commission, and it amended accordingly, with effect from 1 January 1990, article 54 of the regulations of the Fund by replacing paragraph (b) by the following text:

> "(b) In the case of participants in the Professional and higher categories, the scale of pensionable remuneration effective 1 May 1989, set out in the appendix hereto, shall be adjusted on the same date as the net remuneration amounts of officials in the Professional and higher categories in New York are adjusted. Such adjustment shall be by a uniform percentage equal to the weighted average percentage variation in the net remuneration amounts, as determined by the International Civil Service Commission, except that:
>
> (i) The amount of the first adjustment due after 1 January 1990 shall be reduced by 2.8 percentage points;
>
> (ii) The scale of pensionable remuneration determined by the International Civil Service Commission as corresponding to the revised salary structure entering into effect on 1 July 1990 shall become effective on the same date."

The new scale of pensionable remuneration became effective on 1 February 1990. In accordance with the General Assembly resolution, the increase in pensionable remuneration which, because of the 4.5 per cent average increase in New York net remuneration, should have been of 5.5 per cent (4.5 x 1.22), was reduced, first by 1 percentage point (4.5 x 0.22) owing to the elimination of the 1.22 multiplicative factor, and secondly by 2.8 percentage points in order to remove the past impact of the 1.22 factor, resulting in an overall reduction of 3.8 per cent. Accordingly, the increase in the scale of pensionable remuneration was only 1.7 per cent.

In May 1990 a number of staff members of various organizations, including the Applicants, addressed a letter to

the Secretary of the Joint Staff Pension Board, noting that, following the implementation, in their particular case, of the new scale of pensionable remuneration, the amount withheld from their salary as their Pension Fund contribution was 2.8 per cent [sic] lower than it would have been if the rules contained in the previous version of article 54(b) of the Regulations of the Fund had been applied, and that this caused them an injury since their pension rights and related benefits were thereby diminished. They added that the application, in their particular case, of the new scale was illegal; accordingly, they requested the implementation, in their case, of scales derived according to the former rules (including the 1.22 multiplier, without the reduction of future adjustments) contained in the previous version of article 54(b) of the Regulations of the Fund. In addition, they pointed out that their request should be construed as applying, not only to the month of February 1990, but to all the succeeding months as well, so long as scales derived according to the rules contained in the new version of article 54(b) of the Regulations of the Fund continued to be implemented in their case. On 1 June 1990 the Secretary of the Pension Board replied that he was required to apply the Regulations of the Fund as adopted, and from time to time amended, by the General Assembly; the Secretary therefore was constrained to apply in their case, for both contribution and benefit purposes, the scale of pensionable remuneration as in force on 1 February 1990, in accordance with the provisions of article 54(b)(i) of the Regulations. The Applicants subsequently requested a review of the Secretary's decision by the Standing Committee of the Pension Board. On 24 July 1990 the Secretary advised them that the Standing Committee, at its 171st meeting held in London on 27 June 1990, had decided to uphold the Secretary's decision to apply, in their case, the scale of pensionable remuneration for the Professional and higher categories effective 1 February 1990 as determined by the International Civil Service Commission, on the grounds that the Secretary was constrained to apply that scale pursuant to

article 54(b) of the Regulations of the Fund, as amended by the General Assembly through resolution 44/199 of 21 December 1989. On 28 February 1991 the Applicants filed with the Tribunal the applications referred to earlier.

Whereas the Applicants' principal contentions are:

1. The contested decision disregards the principle of non-retroactivity of adverse decisions.

2. The application of the contested decision to the Applicants, following the series of adverse measures taken since 1982, violates the Applicants' rights inasmuch as it disregards the obligation incumbent upon the Fund to maintain a just and effective pension system.

3. The Respondent, in taking his decision, omitted certain essential facts.

4. The Respondent, in taking his decision, drew certain manifestly erroneous conclusions from the file.

Whereas the Respondent's principal contentions are:

1. There was no violation of the principle of non-retroactivity.

2. The Applicants' right to an "effective and just" pension system was not breached.

3. There was no omission of any essential fact.

4. No erroneous conclusions were drawn from the evidence.

The Tribunal, having deliberated from 24 October to 14 November 1991, now pronounces the following judgement:

I. The applications in cases No. 588, Christy, No. 589, Thorstensen, and No. 590, White, present similar facts and identical issues. Accordingly, the Tribunal finds that joinder of these applications would be appropriate, and they will, therefore, be considered together.

II. Each of the applications contests the validity of a decision by the Standing Committee of the United Nations Joint Staff Pension Board ("Board") affirming action by the Secretary of the Board adhering to the revised scale of pensionable remuneration for Fund participants in the Professional and higher categories which was established by General Assembly resolution 44/199 dated 21 December 1989, effective as of 1 January 1990. That resolution amended article 54(b) of the Joint Staff Pension Fund ("Fund") Regulations, and the revised scale was made effective by the Board one month later on 1 February 1990.

III. The amendment of the Fund Regulations relevant to these Applications dealt with the adjustment procedure used in determining pensionable remuneration, which is the figure representing the earnings of a staff member used as the basis for calculating the staff member's contribution to the Fund and the pension itself when that becomes payable.

IV. Both before and in connection with this amendment of the Fund Regulations, the theory underlying the methodology for determining pensionable remuneration and the related adjustment procedure was that, for each grade and step, the level of pensionable remuneration should result in a pension in U.S. dollars whose proportional relationship to the corresponding net remuneration in New York, a ratio known as the "income replacement ratio", would be comparable to the ratio of pension to net remuneration for their counterparts in the United States Federal Civil Service. The General Assembly has looked upon the United States Federal Civil Service as the comparator for the purpose of determining appropriate remuneration and pension levels for the Professional and higher level participants in the Fund. Although the General Assembly did not in amending the Fund Regulations specify a margin range in relation to the U.S. comparator for pensionable remuneration as it had in the past for

net remuneration, cf. Judgement No. 370, Molinier (1986), it requested in 1986 the International Civil Service Commission, in cooperation with the Board, to

> "monitor regularly the pensionable remuneration for staff in the Professional and higher categories of the United Nations and that of the United States federal civil service employees in comparable grades, and to report thereon to the General Assembly as appropriate." General Assembly resolution 41/208, 11 December 1986.

V. Effective 1 April 1987, the General Assembly established a scale of pensionable remuneration and a related adjustment methodology for Fund participants which took into account comparable income replacement ratios as between the United Nations and the United States comparator. The General Assembly did so by providing for an adjustment in pensionable remuneration when the weighted average net remuneration was adjusted. The corresponding pensionable remuneration adjustment consisted of a uniform percentage equal to the product of the weighted average change in the net remuneration in New York multiplied by 1.22. The 1.22 multiplier represented an attempt to compensate for a pre-existing United States income tax law feature which had the effect of distorting the relationship between United States Federal Civil Service net remuneration and counterpart United Nations net remuneration. This distortion occurred because the progressive nature of United States income tax rates had the consequence of causing a 5 percent increase in gross remuneration for employees of the United States Federal Civil Service to be reduced to approximately 4.1 percent of net remuneration. Accordingly, to maintain the comparability of the income replacement ratios between the United Nations and the United States Federal Civil Service, it was deemed necessary to multiply any weighted average percentage change in United Nations net remuneration in New York by 5 divided by 4.1, or 1.22.

VI. In 1989, the General Assembly, after considering the views of the Board and the International Civil Service Commission as

well as others -- not all of which were unanimous --, decided to eliminate for the future the 1.22 multiplier described above. In addition, the General Assembly decided that the use of the 1.22 multiplier since 1 April 1987 had distorted in an unacceptable manner the relationship between the United Nations and the United States comparator service with respect to pensions and the income replacement ratio.

VII. The reason for this was that, before 1988 when the first of three pensionable remuneration adjustments involving application of the 1.22 mutiplier was made, a change in the United States income tax laws indexing tax rates to changes in the cost of living to take account of inflation reflected in taxable income had removed the reason for the 1.22 multiplier. That is to say -- the change in the United States income tax law was seen by the General Assembly as permitting a 5 percent increase in gross remuneration for the United States Federal Civil Service to remain a net 5 percent increase in net remuneration. Thus, as the General Assembly saw it, given the original reason for use of the 1.22 multiplier in determining pensionable remuneration, its continued use would serve no purpose other than to provide an uncalled-for increase in pensionable remuneration and, in turn, would undermine and distort the income replacement ratio concept on which the pension system was premised. In keeping with this rationale of restoring a proper relationship between the United Nations and the comparator service, the General Assembly concluded that it should eliminate not only the 1.22 multiplier for the future but that it should also remove prospectively what it perceived as the past impact of the unjustified adjustments which had occurred in 1988 and 1989 as a result of the application of the 1.22 multiplier. Had this step not been taken, the effect of the 1988 and two 1989 adjustments would have compounded in the future, creating an even greater distortion. Thus the General Assembly resolution of 21 December 1989 subtracted from the first upward adjustment in pensionable

remuneration after 1 January 1990 2.8 percentage points, representing the prior use of the 1.22 multiplier. The consequence of this was that when the weighted average net remuneration in New York was increased by 4.5 percent on 1 February 1990, pensionable remuneration was increased by 1.7 percent (4.5 - 2.8).

VIII. The applications attack both aspects of the General Assembly's action referred to above on various grounds. First, the applications assert that the removal of the 1.22 multiplier effective 1 January 1990 and the deduction of 2.8 percentage points from the 1 February 1990 adjustment in pensionable remuneration violated the principle of non-retroactivity. This principle is codified in article 49(b) of the Fund Regulations, which provides that the Regulations as amended by the General Assembly "... shall enter into force as from the date specified by the General Assembly but without prejudice to rights to benefits acquired through contributory service prior to that date." The Tribunal must consider, therefore, whether either of the changes made by the General Assembly is in conflict with the language of article 49(b) quoted above.

IX. With respect to elimination of the 1.22 multiplier effective 1 January 1990, the Tribunal concludes that this action was within the authority of the General Assembly under article 49. The Tribunal has previously held that prospective action of this nature is not in conflict with the principle of non-retroactivity. See Judgement No. 404, Brede II (1987), para. XI; Judgement No. 406, Cabrera (1987), paras. VIII and IX; Judgement No. 395, Oummih (1987), paras. XI, XX and XXV; Judgement No. 370, Molinier (1986), paras. XLI-XLIII; Judgement No. 360, Taylor (1985), Separate Opinion of Mr. Roger Pinto, paras. V, VII and IX, and Judgement No. 82, Puvrez (1961).

X. With respect to the deduction of 2.8 percentage points from the 1 February 1990 adjustment in pensionable remuneration, the

question whether there was a violation of article 49(b) is also governed by the above judgements and the authorities referred to in the separate opinion of Mr. Pinto in Taylor. On this point, it is acknowledged by the Respondent that the change in article 54(b) of the Fund Regulations by the General Assembly was intended to neutralize for the future the past impact of prior pensionable remuneration increases which the General Assembly considered to have been unjustified because of its belief that the premise on which they had been made became invalid as a result of a change in U.S. income tax laws. It has been contended that this is tantamount to a retroactive reduction in pensionable remuneration which is prohibited by article 49(b) because, as a practical matter, reducing a future upward adjustment arguably has almost the same effect. If valid, that same argument would have led to different conclusions from those reached in the cases cited above, and in the separate opinion of Mr. Pinto in Taylor.

XI. On the other hand, viewed literally, the General Assembly's action did not affect any rights to benefits acquired through contributory service prior to 1 January 1990. As far as each Fund participant was concerned, the amount credited to his or her account with respect to the period prior to 1 January 1990 was calculated in accordance with the Fund Regulations as they then existed. Indeed, any Fund participant who retired prior to or, under certain circumstances, after 1 February 1990 would have received a pension which reflected adjustments before 1990 in pensionable remuneration employing the 1.22 multiplier, or if he died, his heirs would have received a benefit calculated similarly. Moreover, it is clear from the Tribunal's past decisions referred to above that the General Assembly has the authority in appropriate circumstances to make prospective changes, including reductions in pensionable remuneration or in pension adjustments or post adjustments, or to suspend or freeze their application. There is no significant difference of principle as between those cases and this. The Tribunal therefore concludes that the reduction in the

1 February 1990 adjustment by 2.8 points did not violate article 49(b). Its effect was lawfully to provide for the future a smaller increase in pensionable remuneration than would otherwise have occurred, and this was done solely for the purpose of attempting to maintain a proper relationship between United Nations and common system pensions and those of the United States comparator service.

XII. Contrary to the dissent in the present case, the Judgement in Taylor does not, in the opinion of the majority, support the result proposed by the dissent. Taylor involved a right that Mr. Taylor had before his separation which he subsequently sought to exercise when he resumed his employment with the Organization at a later date. The question in that case was whether the General Assembly had intended to extinguish that right when, between the time of Mr. Taylor's separation and the resumption of his employment, the General Assembly prospectively abolished such rights. The Tribunal held that such a retroactive effect had not been intended by the General Assembly. That situation is quite different from this case. Here, as noted above, pensionable remuneration amounts determined before the effective date of the General Assembly's resolution were unaffected, and those who became entitled to payment of pension benefits prior to that date received them on the basis of those amounts. Moreover, even after the effective date, there was no change in the pensionable remuneration amounts with respect to prior periods. The General Assembly resolution affected only the determination of pensionable remuneration with respect to future periods, and there is no question at all of extinguishing an unexercised right of any staff member which the staff member sought to exercise.

XIII. The Applicants assert that the changes made by the General Assembly which they challenge are in violation of the Applicants' right to the maintenance of an effective and just pension system. The Tribunal has previously held and reiterates that the Fund is

under an obligation to maintain an effective and just pension system. But this does not mean that the system may not be modified so long as the modifications are not arbitrary, are in conformity with the object of the pension system, and promote implementation of the principles laid down in Article 101 of the United Nations Charter.

XIV. The Tribunal is unable to find on the facts of this case any violation of these principles. It is within the province of the General Assembly, following advice of the International Civil Service Commission, the Board and others, to make reasoned judgements with regard to the pension adjustment system as it did here, which it viewed as correcting a feature introduced in 1987 that had become erroneous by the time it was applied in 1988 and 1989. It is not for this Tribunal to attempt to evaluate the complex considerations involved in making determinations as to comparable income replacement ratios, or the effect on comparable pensions of changes in the United States tax laws, or similar matters. These are properly matters for the General Assembly's judgement. And it is surely not within the competence of this Tribunal to substitute its judgement for that of the General Assembly with respect to matters of that nature.

XV. Once it is clear, as it is here, that modifications are not arbitrary or abusive, but instead have a reasonable basis and are in conformity with the objectives of the pension system, there is no occasion for the Tribunal to intervene. Increases in pensionable remuneration resulting from unjustified adjustments are not among the objectives of the system. It cannot be said, therefore, that the modifications here are in conflict with any principles laid down in the United Nations Charter, much less that they can reasonably be regarded as improperly unfavourable to staff members, or destructive of staff members' rights to a pension system. On the contrary, nothing in the Charter or in

common sense suggests that prospective correction of flawed past procedures or reasonable changes which result from unforeseen developments are necessarily prohibited.

XVI. The Applicants also contend that, in deciding to make the changes complained of, the General Assembly omitted consideration of essential facts and drew manifestly wrong conclusions from the evidence before it. In essence, the first of these arguments by the Applicants asks the Tribunal to evaluate the judgement of the General Assembly in deciding to act as it did even though a comprehensive review of the subject of pensionable remuneration was being carried out. This argument is lacking in merit. It is not within the competence of this Tribunal to inquire into judgements by the General Assembly as to when it wishes to act with respect to a particular matter.

XVII. Finally, in arguing that the General Assembly's action was unlawful because it allegedly drew erroneous conclusions from the facts before it, the Applicants are again asking this Tribunal to substitute its judgement for that of the General Assembly with regard to the conclusions to be drawn from the facts before it and the recommendations received by it from the Board, the International Civil Service Commission, and others and to substitute its judgement for that of the General Assembly with respect to its evaluation of the United States Federal Civil Service as the comparator and the effect of changes in United States income tax laws. In this regard, the Tribunal notes some inconsistency in the position of the Applicants in seeking, on the one hand, to continue to benefit from an adjustment that stemmed from the use of the U.S. Federal Civil Service as a comparator, and, on the other hand, to object to the use of that comparator by the General Assembly in deciding to eliminate the same adjustment. In any event, however, the conclusions to be drawn from the facts are matters for the General Assembly to decide -- not this Tribunal.

XVIII. For the foregoing reasons, the applications are rejected in their entirety as is the plea for costs.

(Signatures)

Jerome ACKERMAN
Vice-President

Arnold KEAN
Member

New York, 14 November 1991

Jean HARDY
Acting Executive Secretary

DISSENTING OPINION OF MR. ROGER PINTO

(ORIGINAL: FRENCH)

I. I regret that I must disagree, at least in part, with the majority.

II. The Applicants contest the application to them of section II of General Assembly resolution 44/199 of 21 December 1989, on the one hand because it eliminates the 1.22 multiplicative factor previously established by article 54 (b) of the Regulations of the United Nations Joint Staff Pension Fund (hereinafter the "Regulations of the Fund") for the adjustment of their pensionable remuneration, and on the other because it adds to that provision a new subparagraph (i) stating "The amount of the first adjustment due after 1 January 1990 shall be reduced by 2.8 percentage points". My dissent relates only to the latter issue.

III. The Respondent has stated that these measures were not taken for financial reasons or for the sake of economy. He asserts that even if those two measures had not been adopted, the actuarial balance of the Fund would not have been threatened. The Secretary of the Pension Board, Mr. Gieri, stated during the oral proceedings that the measure had not been intended as a means of dealing with a financial crisis. He further stated:

> "This was not a measure to reduce the actuarial imbalance of the Fund. This was a comparison of the United Nations/United States situation". (AT/PV/154, p. 35)

IV. The parties agree that amendments to the Regulations of the Fund must not have a retroactive effect when applied to participants. The principle of non-retroactivity is established in article 49 (b) of the Regulations of the Fund. But it is general in scope, as the Respondent has acknowledged in the course of a number of proceedings before the Tribunal. It has been the Tribunal's consistent practice to confirm without ambiguity the principle of non-retroactivity as a general principle of law, which is applicable even in the absence of a text (Judgements No. 82, Puvrez (1961); No. 202, Quéguiner (1975); No. 273, Mortished (1981); No. 360, Taylor (1985); No. 370, Molinier (1986); No. 378, Bohn (1986); No. 379, Gilbert (1986); No. 395, Oummih (1987) and No. 404, Brede II (1987)). The practice of the Administrative Tribunal of the ILO likewise confirms the principle of non-retroactivity.

V. With regard to the 1.22 multiplicative factor, General Assembly resolution 44/199 amends article 54 (b) of the Regulations of the Fund by eliminating that multiplicative factor for the future exclusively. This measure is therefore not retroactive in character.

VI. The amendment of the pension system falls within the jurisdiction of the General Assembly. It is not for the Tribunal to express a view as to the advisability of measures taken in

that regard. As the Tribunal affirmed in its Judgements No. 378 and No. 379 and reaffirmed in its Judgement No. 404, the Fund is under an obligation to maintain "an effective and just retirement pension system", notably "with respect to the pension adjustment system".

VII. The contested amendment to the Regulations - elimination of the 1.22 multiplicative factor - is not arbitrary or unreasonable in character. It is consistent with the general pensions policy. Its application to the Applicants thus entails no violation of the law. On this point I concur with the judgement.

VIII. The Applicants contest, secondly, the application on 1 February 1990 of a 2.8 per cent reduction coefficient in the calculation of their pension adjustment pursuant to the 1989 amendment to article 54 (b) of the Regulations of the Fund.

IX. The principle of non-retroactivity is formally respected in time, since the new provisions apply only from 1 February 1990 onwards.

X. On the other hand, the principle is undeniably violated as regards the content of the new provision.

XI. The basically retroactive character of this provision appears clearly in the 1989 report of the International Civil Service Commission, Volume I (A/44/30, para. 42), in which the Commission recommends the 2.8 percentage points reduction "in order to remove the past impact of the 1.22 factor" (emphasis added).

XII. This retroactive character is acknowledged by the Respondent in his answer (para. 19):

> "The 2.8 percentage point 'excess' was due, as indicated earlier, to the failure to eliminate the 1.22 multiplicative factor when changes in US tax laws so warranted".

XIII. In other words, everything takes place as though the 1.22 multiplicative factor had been eliminated from 1987 onwards by the amendment of article 54 (b) of the Regulations of the Fund. However, that amendment was not made until 1989. Until it was amended by a decision of the General Assembly in that year, the text read as follows:

> "Such adjustment of the pensionable remuneration shall be by a uniform percentage equal to the weighted average percentage variation in the net remuneration amounts, as determined by the International Civil Service Commission, multiplied by 1.22".

XIV. As a result of the 2.8 percentage points reduction in the adjustment of 1 February 1990, the Respondent applied retroactively the elimination of the 1.22 factor.

XV. Acknowledging the validity of such a step would clearly deprive the principle of non-retroactivity of its substance. The system adopted eliminates retroactively the effects already produced by the application of the rules in force in the past from 1987 to 1989. Those rules were in fact applied, three times, at the time of each adjustment, to each Applicant by decision of the Fund - as the Respondent himself acknowledged in the oral proceedings.

XVI. Moreover, the application of the 2.8 reduction coefficient to the Applicants adversely affects their acquired rights.

XVII. In effect, as the Respondent himself acknowledges, the 1.22 multiplicative factor was applied to each of the Applicants individually from 1987 to 1989 in connection with the periodic adjustment of their pensionable remuneration. They thus acquired a right to the maintenance of the adjustments from which they had benefited in accordance with article 49 (b) of the Regulations of the Fund.

XVIII. A refusal to allow the Applicants to benefit from this right would run counter to the established practice of the Tribunal (see para. IV above). In particular, in Judgement No. 360, Taylor (1985), the Tribunal sanctioned the maintenance of a right that was simply conditional. The Tribunal expressed itself as follows with regard to the right in question:

> "Admittedly, this right was conditional ... . Nevertheless, it was a right, and an important one at that" (para. XIX, in fine).

It would be inconceivable that the Applicants could be deprived of the rights they had acquired by virtue of the adjustment decisions from which they had benefited.

XIX. The Respondent does not contend that in applying the 1.22 multiplicative factor to the Applicants from 1987 to 1989 he committed an error of law. He likewise does not contend that he committed a clerical or arithmetical mistake.

XX. During the oral proceedings Mr. Gieri replied most candidly when asked why nothing had been done between 1987 and 1989 to amend article 54 (b) of the Regulations of the Fund:

> "The only way I could answer that question, in all candour, ... is to say that the system was allowed to drift. If that was negligence on the part of the two reviewing bodies, so be it." (AT/PV.154, p. 39).

This negligence continued for three years.

XXI. The Administration, not the Applicants, is responsible for that situation. The Administration cannot make the Applicants bear the burden of this responsibility by means of a misuse of procedure.

XXII. If indeed the Respondent had directly annulled the adjustments made from 1987 to 1989, this retroactive measure would have been taken in violation of the Applicants' acquired

rights. By making the 2.8 percentage points reduction, the Respondent achieves indirectly what he could not have done directly. I view this as a real sleight of hand.

XXIII. The Respondent has thus not only violated the principle of non-retroactivity and the acquired rights of the Applicants, but has also committed a misuse of procedure. He has infringed the right of due process.

XXIV. There may seem to be no harm, in the case in point, to allow the Administration to apply retroactively a "system" which it had "allowed to drift." But the law has its reasons and it is with these reasons alone that the Tribunal must concern itself. Such a violation of law, if allowed to stand, would open the way to abuses of all kinds.

XXV. In my view, the pleas of the Applicants concerning the 2.8 percentage points reduction of the adjustment of 1 February 1990 should therefore be allowed. That reduction should not be applied to them.

(Signatures)

Roger PINTO
President

New York, 14 November 1991

Jean HARDY
Acting Executive Secretary